

No 71.

If a person is intrusted to do diligence against a debtor, betwixt and a certain day, altho' the debtor die before the day, yet if he know, and suffer another creditor to comprise, and do no diligence within year and day thereafter, he is liable for the whole debt assigned, for which he should have done diligence.

1674. June 10. MR MUNGO WEMYSS, Minister, *against* MR JOHN WILSON.

IN a pursuit at the instance of the said Minister against Wilson, for payment of a sum of money contained in a bond granted by David Balfour of Nether-samford, to which he was assigned, upon his obligation to do exact diligence, by leading a comprising against the debtor's land before Martinmas 1671; in respect that the debtor died before any diligence was done, and that, after his death, his lands were adjudged at the instance of the Lady Samford Nairn, whereby the pursuers were altogether prejudged of their debt, after proponing of some allegeances, and referring to the pursuer's oath, which were denied; and the defender being desired to give in a condescendence of damage, viz. the whole sum contained in the bond and assignation; it was *alleged* for the defender Wilson, That he could not be liable for any damage for not doing diligence before Martinmas, after the date of his obligation; because the debtor died five months before that time, and he was only obliged at any time before Martinmas to lead a comprising; neither could he be liable for not doing diligence after Martinmas and the debtor's death; because any adjudication or comprising would have been ineffectual, seeing the Lady Samford Nairn did, immediately after expiring of year and day, adjudge the said lands belonging to the common debtor, upon a disposition and obligation to infest, granted by the debtor before any diligence or inhibition was served against him; and so any comprising which could have been led of these same lands, would have been to no purpose. It was *replied*, that the defender ought to be liable, notwithstanding, to the whole damage; because he being a procurator before the consistory of St Andrews, and accepting of the trust and employment as an intelligent man, not only he was so negligent that he never did any diligence before the debtor died, who subscribed his trust by the space of six months, and was known to him to be a sickly dying man for a long time, but likeways did expressly know of the Lady Samford's disposition, which was but personal; and notwithstanding did forbear to comprise, whereby getting the first real right, he would have been preferred. And albeit he was not bound to do diligence, but at any time before Martinmas, yet year and day being expired, after the common debtor's distress, and doing no diligence, but suffering the Lady to adjudge, whereas, if he had comprised before her, he would have been preferred, or if he had done the like diligence within year and day, he would have come in *pari passu*; but having altogether neglected to do any diligence, he ought to be liable.—THE LORDS having considered the case, that it was not only of a trust voluntarily undertaken, but given to the defender as a man versed in law, of purpose that he might do diligence;—found, that albeit the common debtor died before Martinmas, yet if *allose* he had omitted, that he ought to be liable, which they ordered the pursuer to condescend upon and prove; and albeit that should not be proven, they found, that after year and day, the doing no diligence by comprising,

whereby he might either have been preferred, or come in *pari passu* with the Lady Samford Nairn, who had adjudged, that he ought to be liable for the whole damage; albeit it was *argued* by some of the LORDS, That the Lady's adjudication being upon a special obligation to dispoise the whole lands irredeemable, she would have been preferred, albeit they had been equal in diligence; or if Wilson had adjudged only after or within year and day, he could not have craved the benefit of the act of Parliament to come in *pari passu*, which is only granted where the case is betwixt comprisers or adjudgers for personal debts.

No 71.

*Fol. Dic. v. i. p. 243. Gosford, MS. No 694. p. 414.*

1711. November 28. TROQUHEN against BALMAGHIE.

JOHN INGLIS, Commissary of Kirkcudbright, as principal, Roger Gordon of Troquhen, and Maghie of Balmaghie, as cautioners, become debtors to Mr John Birny for 1000 merks. The two cautioners being forced to pay the debt, they take the assignation in Balmaghie's name, and Troquhen gets a back-bond from him, acknowledging the trust, and obliging himself to do diligence against Inglis for recovery of the money. Troquhen pursues Balmaghie's heir on the passive titles, either to refund the half of the sum, or shew diligence against the common debtor. *Alleged*, Absolvitor from diligence, because it would have been wholly unprofitable; in so far as he offers to prove, that Inglis, at the time he gave the obligation, was altogether insolvent, and so holden and repute by the whole neighbourhood; there were so many diligences, both personal and real, by adjudications, infestments, and other preferable burdens, that it would have been lost money to have done any diligence against him, where none was to be expected in return: And the half of the sum being his own, it is not to be presumed but he would have looked after it, if he had seen any rational prospect. And this defence has been sustained to tutors, who are more strictly bound than common trustees; for Durie observes, that tutors were not made answerable for diligence, where their pupil's debtors were not *solvendo*, and that they were not bound to throw away money in prosecuting broken debtors, Watson, No 37. p. 3501.; and Hamilton *contra* Hamilton, No 39. p. 3502. And Stair's *Instit. Tit. Tutors. Answered*, There is a plain disparity betwixt the two cases; for, in tutors, the obligation is not *ex pacto*, but arises *ex quasi contractu*, and is interpreted *ex bono et æquo*, what a prudent rational man would do in such circumstances; but the burden of diligence arises here from an express positive stipulation, where he precisely binds himself to diligence; and *esto*, his real estate had been carried away by adjudications, yet he ought to have used caution, and it has been frequently seen, that the *squalor carceris* has caused them or their friends discover secret funds towards their liberation; and, in this case, Inglis lived many years after Balmaghie's obligation to relieve Troquhen and

No 72.

Two cautioners having paid a debt, and an assignation being taken in the name of one of them, who obliged himself to do diligence against the principal debtor for their common relief, it was found, that though, at the date of the obligation, the principal debtor was habite and repute insolvent, the one cautioner was liable for relief to the other, because he had neglected to do diligence.